How to Save a Constitutional Court: A Comment

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September 2023

Wielding the power of judicial review and often being equipped with a number of ancillary functions concerning the regulation or oversight of the political processes, constitutional courts (as defined in functional terms) are expected, and aspire, to serve as the most prominent guardians of liberal democratic constitutions. But when a liberal democracy backslides, its constitutional court often finds it difficult to fend for itself and is likely to be among the first victims of democratic erosion. Rather than going down into history as a superhero who saved the constitutional order of liberal democracy, a constitutional court that finds itself under attack from shameless power-grabbers and authoritarian populists alike may as well die a martyr, lay low to survive, or end up being captured and turn into a villain itself. Contemporary Hungary and Poland have become textbook examples of how ruthless and cunning an electoral authoritarian regime can be in first defying and undermining the authority and independence of the constitutional court and then packing the court with regime loyalists (Sadurski, 2022). And this year, many eyes are on Israel, where the far-right government's agenda to overhaul the judiciary in the name of advancing democracy has met with mass protests and international concerns (Bazelon, 2023).

Judicial independence in general, and the independence of the constitutional court in particular, is never something that can be taken for granted. In a time when our thinking about democracy has shifted from democratic transition and consolidation to democratic backsliding, or to put it more bluntly, "how democracies die," it has become all the more pressing to ensure the resilience of the judicial safeguards of democracy—even if the most they could do, is to "buy time for the popular and elite defenders of democracy to regroup for a renewed electoral challenge" (Ginsburg and Huq, 2018: 189). It is all the more pressing because the foes of liberal democracy have updated their playbook and learned how to weaponize all sorts of legal tools and levers at their disposal, but our strategies to defend liberal democracy under the rule of law have yet to catch up. How to enhance the resilience of the constitutional court (as well as the ordinary courts) is a common challenge to all of us who are committed to the project of liberal constitutional democracy. Democratic erosion through partisan degradation, after all, can happen in any democracy, and no constitutional court is immune to the threats posed by partisan wrongdoers. This challenge is also an urgent call for action. We have to "weatherize" the courts and add more insurance for their survival before it

is all too late.

As a veteran constitutional court President and Justice who had to prolong his service for more than a year due to a deliberate delay in judicial replacement, Professor Dainius Žalimas provides us with a most timely and vivid recount of how the battle for the soul of constitutional court has been fought in Lithuania in the recent years. Most of the constitutional lawyers and jurists in Taiwan have limited knowledge about the law and politics in Lithuania, but we can easily understand and relate to the story Professor Žalimas shares with us, because at least two misfortunes that befell the Lithuanian Constitutional Court also happened in Taiwan a few years ago. In 2005, the Legislative Yuan (LY; Taiwan's unicameral parliament) decreased the renumeration for the Justices of the Taiwan Constitutional Court (TCC) just to retaliate a major ruling of the Court that struck down several provisions of a controversial statute enacted in 2004. It took another TCC decision—J.Y. Interpretation No. 601 (2005)—to right the wrong. In 2007, the LY rejected four nominees to the TCC. The stated reason was that those nominees' partisan affiliation in the past had rendered them unfit for judicial office, but the rejection vote itself was arguably a thinly-veiled partisan maneuver to retain a few more TCC vacancies for the next (hopefully like-minded) President to fill. Professor Žalimas is surely right to raise the red flag and denounces what happened in Lithuania as shameful attacks on judicial independence, and I am afraid that in Taiwan we had not done so enough to prevent such travesties from happening again.

To the extent that constitutional court is not a king/queen that can do no wrong and is still subject to checks and balances, why is it wrong for the elected political branches to exert their political will and influence the composition and workings of the constitutional court as they see fit? The normative case Professor Žalimas makes for a rather strong protection for the independence of constitutional court seems to echo what former Justice of the U.S. Supreme Court Stephen Breyer argues in *The Authority of the Court and the Peril of Politics* (2021). Professor Žalimas tells us that "[t]he Constitutional Court is a legal, but not a political institution." Justice Breyer is also convinced that "it is wrong to think of the Court as a political institution. And it is doubly wrong to think of its members as junior varsity politicians" (Breyer, 2021: 62). If it is wrong to treat the constitutional court and its justices as such, it follows that the constitutional judges themselves should not act like "politicians in robes," either. Professor Žalimas's pointed criticism of the recent jurisprudential switch in the Lithuanian Constitutional Court also reminds me of what Justice Breyer once lamented: "It is not often in the law that so few have so quickly changed so much" (Guinier, 2008: 9). The problem, though, is that even if law somehow can be separated from politics, we often cannot agree on where to draw the line. The sad truth of the day, I am afraid,

is that when the body politic becomes increasingly polarized, so goes the law.

As a student of judicial behavior, I could not help but take the view that all judges, and constitutional court justices in particular, are *political* at least in the sense that their decision making is invariably affected by their worldviews and ideologies. But they also took the oath to faithfully and impartially perform their judicial duties to uphold the rule of law. They should strive to live up to their roles as judges in all good faith, and we as a political community should let them do their works without favor or fear. Professor Žalimas and Justice Breyer's insistence on a categorical distinction between law and politics, therefore, can be understood not as an elusive attempt to restore a Noble Lie few would still believe in (Tribe, 2022), but as an exhortation to cultivate and enforce what political scientists Steven Levitsky and Daniel Ziblatt characterize as political norms of "institutional forbearance," the idea that we don't play dirty or do whatever it takes just to win a partisan fight (Levitsky and Ziblatt, 2018). How to rebuild and strengthen such guardrails of democracy after they were broken is an issue for another time, but Professor Žalimas is surely leading us in the right direction: To save a constitutional court or a constitutional democracy, the least we have to do is to stay vigilant and call out abuse of power whenever we see one.

Reference

Bazelon, Emily. "In Israel, High Stakes for High Court: Democracy's Fate." *New York Times*, July 31, 2023. Israeli Court Ruling May Determine Democracy's Fate - The New York Times (nytimes.com).

Breyer, Stephen. *The Authority of the Court and the Peril of Politics*. Cambridge, MA: Harvard University Press, 2021.

Ginsburg, Tom, and Aziz Z. Huq. *How to Save a Constitutional Democracy*. Chicago: The University of Chicago Press, 2018.

Guinier, Lani. "Foreword: Demosprudence through Dissent." *Harvard Law Review* 122 (2008), 4-138.

Levitsky, Steven, and Daniel Ziblatt. *How Democracies Die*. New York, NY: Penguin Books, 2018.

Sadurski, Wojciech. *A Pandemic of Populists*. New York, NY: Cambridge University Press, 2022.

Tribe, Laurence H.. "Politicians in Robes." *The New York Review of Books*, March 10,

2022. Politicians in Robes | Laurence H. Tribe | The New York Review of Books (nybooks.com).